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No. 314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

WICHITA ROYALTY COMPANY ET AL, *Petitioners,*

versus

CITY NATIONAL BANK OF WICHITA FALLS ET AL,
Respondents.

BRIEF OF RESPONDENTS

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BAILEY—WICHITA FALLS

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This case originated in the State Court in the year 1930. It was a suit by the Bank upon a promissory note. To this suit a cross action was filed in April, 1931, by the Royalty Company (R. 1972), wherein it was alleged that the Bank and Harrell, its president, became liable to the Royalty Company by knowingly participating with its trustee in the spoilation of the trust and by accepting funds of the trust in payment of the trustee's individual debt. It was also alleged that the circumstances in the handling of the account charged the Bank with notice and knowledge of the trustee's wrong.

The case was tried before a court and jury and at the conclusion of the trial a peremptory instruction was given to find for the plaintiff bank against the defendant, the Wichita Royalty Company.

After an appeal and affirmance by one of the Courts of Civil Appeals, 74 S. W. (2d) 661, the judgment of the trial court was reversed and remanded by the Supreme Court of Texas. (*Wichita Royalty Company v. City National Bank*, 127 Texas 158.)

The Supreme Court of Texas considered this case along with the case of *Quanah, Acme & Pacific Railway Company v. Wichita State Bank & Trust Company*, 89 S. W. (2d) 385, involving a similar question. Both cases were decided on original submission on the same day and substantially the same conclusions were reached in each of the two cases, holding the bank to a strict liability in accordance with the Minority Rule requiring bankers to inquire into the conduct of trustees where suspicious circumstances might lead to the discovery of a breach of trust,—a doctrine of constructive notice. The opinion in the Royalty Case refers to the Railway Case opinion.

On rehearing in the Quanah, Acme & Pacific Railway Case this doctrine was expressly repudiated. But inasmuch as the appeal in the Wichita Royalty Case was an appeal from an instructed verdict, wherein issues of fact were raised as to the Bank's active participation and receipt of trust funds on the indebtedness of the trustee, the motion was overruled, remanding the case to the lower court for a new trial. The Commissioner in overruling such motion stated that the findings of fact as to liabilities of the Bank were not stated as finalities,

and that issues of fact as to such questions of liability on the part of the Bank were not foreclosed.

On this question the Court says:

> "*It is not intended by anything said in the original opinion to foreclose upon another trial the question of whether the items contended by the Bank to constitute the* $5,500.00 *were used for authorized trust purposes; or to foreclose any purely fact finding that may be made from the evidence that may be adduced upon another trial.* The suggestion in the original opinion that an audit should be made for use upon another trial, and the statement that the various sums therein referred to were not stated as *finalities, were indicative of such intention.*" (93 S. W. (2d) 143, 144.) (Italics ours.)

After the return of the suit to the trial court, an amended cross petition was filed by the Royalty Company, making additional parties, injecting the Federal Laws into the case, and claiming other and additional items of recovery from those involved in the original cause. (R. 190-231.)

Acting upon the suggestion of the Supreme Court, both the Bank and the Royalty Company caused a complete audit of all the transactions between Peckham, individually and as trustee, with the Wichita Royalty Company, as well as with the Bank and Harrell, to be made.

The result of the Bank's audit is shown by the testimony of P. H. Lambert, C. P. A. (R. 1436-1513), and by the Plaintiff's Exhibits 207, 208, 209, 210, 210a, 211, 212, and 212a. (R. 1346-1511.)

The result of the Royalty Company's audit is shown

by the testimony of M. E. Wallace, C. P. A. (R. 1648-1734; Defendant's Exhibit 187, beginning at R. 1683.) The trial court accepted Lambert's audit.

In the audit of P. H. Lambert each transaction wherein funds were transferred from the Royalty Company account to the individual account of Peckham, from the very beginning of his tenure, was traced and explained. This resulted in an entirely different state of facts from that found by the Court of Civil Appeals, upon which the Supreme Court based its opinion. And, in order to show that there is no conflict between the holding of the Circuit Court of Appeals and the United States District Court and the Supreme Court of Texas on the issues involved, we briefly refer to the holding of the Supreme Court on the evidence introduced on the first trial and the holding of the Federal Court on the evidence introduced on the second trial.

DIFFERENCE BETWEEN RECORDS IN FIRST TRIAL AND SECOND TRIAL

(a) The main item that the Supreme Court of Texas fixed liability on the Bank and Harrell in its opinion, was based upon a certain $5,500.00 check deposited to the credit of G. W. Peckham in October, 1925. (89 S. W. (2d) 399, 93 S. W. (2d) 143.)

Upon the trial of the case the *first time* in the State Court, the evidence reflected, and the Supreme Court so held, that Peckham illegally withdrew from the Royalty funds on October 8, 1925, $5,500.00, and that there was no evidence of any balance standing to Peckham's credit in said Bank, or of any other deposit of funds credited to his account, between said

date of transfer and November 17, 1925, at which time Peckham made his first payment out of his account on his indebtedness to the Bank. (89 S. W. (2d) 399.)

Upon the *second trial*, in the Federal Court, it was conclusively shown that every penny of this $5,500.00 item was properly accounted for and all of it was expended in the acquisition of royalties for the Royalty Company. (R. 817-820.)

* * *

(b) The Supreme Court, likewise, fixed liability upon Harrell by virtue of a certain purchase, known as the Stephens Royalty. On the *second trial* in the Federal Court, it was conclusively shown that same was purchased by Peckham for the benefit of the Royalty Company; however, at the time of the purchase, Harrell and his associates thought that the transaction was for Peckham's individual benefit. This property was valuable royalty, and all the proceeds were received by the Royalty Company and said property was sold by Scannell after he became Trustee, and prior to the filing of the Royalty Company's Cross Action. (R. 822-839, R. 1447-1449.)

(c) Upon the trial of the case the *first time* the Royalty Company sought to recover an item of $6,000.00, which was received by Peckham, through the Security National Bank, and the Supreme Court so declared its right to recover this item. (89 S. W. (2d) 403.)

Upon the trial of the case the *second time* in the Federal Court, the evidence conclusively showed that the Bank and Mr. Harrell had nothing to do therewith, and in fact the Royalty Company withdrew this claim. (R. 841, 853.)

* * *

(d) Upon the trial of the case the *first time*, the record reflected, and the Supreme Court so declared, that Peckham's appointment of E. E. Scannell, as Secretary and Treasurer, was in violation of the provisions of the Declaration of Trust under which Peckham acted as Trustee. (*Bank v. Royalty Company*, 89 S. W. (2d) 405.)

Upon the trial of the case the *second time*, in the Federal Court, this was completely refuted by additional evidence and the Court so found. (95 Fed. (2d) 676.)

* * *

(e) The Supreme Court of Texas fixed liability upon the Bank and Harrell with respect to the Marlborough property, by virtue, at least in part, of Scannell's testimony that the deed was not delivered and that the transaction was personal to Peckham, but on the *second trial* in the Federal Court it was conclusively shown that J. A. Kemp and J. T. Harrell entered this venture with G. W. Peckham and his brother, W. H. Peckham, and that Kemp and Harrell contributed their full pro rata share of the funds for the acquisition and improvement of this property. It was further conclusively shown that this sale of the Marlborough Property by Peckham to the Wichita Royalty Company, was without the knowledge of Harrell or Kemp, and Peckham's letter to the Wichita Royalty Company (which was without the knowledge of Kemp or Harrell and which was concealed by Scannell in the first trial) reflected the reasons therefor:

"While one-half (1/2) of Marlborough Addition belongs to the Wichita Royalty Company, it is held in my name because of the fact that the other

owners would not care to be associated with a stock company, but are willing to be partners with me as an individual."

The evidence on the *second trial* was sufficient for the Trial Court to find that the stockholders of the Royalty Company had knowledge of the purchase by Peckham of the Marlborough Addition because the Royalty Company records reflected that for more than 2½ years each and every expenditure made on the Marlborough property was recorded in the Royalty records and reflected the ownership of the Royalty Trust of one-half interest in and to the Marlborough properties (and the record further reflected that E. E. Scannell had concealed from the Bank and Harrell the deed that had actually been delivered to the Royalty Company of one-half interest in the Marlborough transaction), and this fact, together with the fact that each six months during Peckham's administration reports were made to the stockholders, showing the respective purchases prior thereto, justified a finding that this report was concealed by E. E. Scannell, and hence the stockholders were in fact apprised of the purchase of the Marlborough property. (18 Fed. Supp. 797, 799.)

* * *

(f) On the trial in the State Court, the evidence reflected, and the Supreme Court declared, that "* * * Peckham's Deed purporting to convey the Marlborough property to the Trutee, was not delivered by Scannell, and title to the property was never accepted by the trustee." (89 S. W. (2d) 403.) * * * However, on the re-trial, in the Federal Court, it was conclusively shown, without dispute, that *Scannell had concealed the true facts* in the trial in the State Court with reference to the delivery of this deed.

(R. 784-786.) A letter was in the file * * * discovered by the Bank's auditor * * * signed by Peckham, which showed an unconditional delivery of this deed. And the Trial Judge, on this question, said:

> "Scannell claimed at that trial (referring to the *first trial* in the State Court) that a deed had been given to the Trustee by Peckham, but that Peckham had cautioned him to keep it quiet, and under his testimony it appeared not to have been legally delivered to his principal, a claim dissipated at this trial." (18 Fed. Supp. 799.) (Italics ours.)

* * *

(g) In the trial of the case the *first time* in the State Court, the Supreme Court declared that the evidence did not reflect that the stockholders had any evidence calculated to arouse an inquiry on their part concerning their Trustee, Peckham. (*Royalty Co. v. Bank*, 89 S. W. (2d) 406.)

The evidence on the trial in the Federal Court reflected that minute memoranda of all the transactions of Peckham were inscribed on the record of the Royalty Company, and in most, if not all, instances reported to the stockholders in periodical communications from the trustee. Such communications were shown in the record, with the exception of the semi-annual report in June, 1926, which was the date of the first report after the acquisition of the Marlborough property. (*Bank v. Royalty Co.*, 18 Fed. Supp. 797.)

* * *

(h) In the first suit the transactions only went back to October 8, 1925, and included the Marlbor-

ough transaction and certain royalty purchases, as follows:

Ellis County, Oklahoma, Royalty.
Hartley County Royalty.
Porter Ranch Purchase.
North Anderson Ranch and Polk Lands.
Stephens Royalty.
Gray and Wheeler County Royalties.

(The latter being omitted on this trial after they had become valuable.)

Peckham became trustee in January, 1923. (R. 366.) Later, on June 18, 1936, nearly seven years after the death of Peckham and more than five years after, admittedly, Scannell and the shareholders were familiar with all the claimed wrongs on the part of Peckham and the Bank, the "Third Amended Cross Action and Bill of Interpleader" was filed (such being the pleading upon which this cause was removed to the Federal Court, R. 33), which included new items, such as the Grimshaw (purchased in 1923), the L. F. Wilson Royalty, the South Anderson and Pointevent Properties, the White Lease, the Routon Royalty, the Millner Oil Payment, the Curtis Lane Royalty, a Studebaker car, and salary payments to Peckham during his entire tenure of office, and it was proven that the checks for all these purchases were currently returned to the Royalty Company and the voucher notation showed what each transaction was for; also that prior to the time of Peckham's tenure Scannell, who worked for the former trustee, adopted a method of making checks for disbursements payable to the payee bank. (R. 1465.)

* * *

(A complete analysis of each and every item complained of by petitioner is inserted in this brief as an Addendum, and, following said analysis, we call the Court's attention to many inaccurate and biased statements set forth in petitioner's complete brief. See pp. 53-59 of this brief.)

There was a conflict in the testimony in respect to the findings and conclusions of Auditor Lambert and Auditor Wallace. Lambert testified and showed from his exhibits that the first receipt of money belonging to the Royalty Company by the Bank in payment of any individual indebtedness of Peckham was on January 19, 1927, and it amounted to $1,287.11. (R. 1443.) Wallace makes it an earlier date, but the trial court found in favor of Lambert's testimony, tersely setting forth his reasons as follows:

> "In weighing Carson and Lambert against Wallace I have taken into consideration the fact that Carson has gone into exhaustive detail—having spent many months in the examination, as has also Lambert. Wallace spent a much shorter time and seems to have been misled, at any rate, to some extent, by confusion resulting from his determination to charge to Peckham, as improper withdrawals, approximately $30,000 in salary." (18 F. Supp. 798; R. 1928.)

All subsequent checks after this date made by Peckham on the Royalty account that are in any manner questioned do not aggregate the amount of the plaintiff's note indebtedness of $22,000.00. (See Plaintiff's Exhibit 212, R. 1477-1493.)

Scannell, the present trustee, the principal actor in

this case, occupies an unenviable position. He was office manager of the trust during the tenure of G. W. Peckham as trustee. He occupied the same position with the former trustee, Robertson. (R. 652.) It was Scannell, as such officer, who originated and was responsible for the plan of drawing checks payable to the order of the payee bank for general disbursements. This was a custom originated by Scannell during the administration of the predecessor trustee, Robertson, and carried on by him during Peckham's trusteeship. (R. 1465.)

Scannell handled practically every transaction complained of. He signed the checks and prepared the voucher notations accompanying the same. These showed correctly the purpose for which they were given. Scannell knew about each and every transaction at the time it happened. (R. 652-731.)

Peckham was of good reputation. (R. 425.) He died suddenly, without forewarning, and before he had time to arrange his financial affairs. (R. 426.)

Scannell was appointed to succeed him. After he was appointed he made an audit and determined an indebtedness due the Royalty Company by Peckham of some $19,000.00. This he prepared in the form of a claim and presented it to the administrator, which was disallowed, and no suit was ever filed as required by the Texas statutes to establish it. (R. 805-806.)

In the State suit one of the principal issues related to the delivery of a deed from Peckham to the Royalty Company, conveying a one-half interest in Marlborough Addition. On that trial Scannell falsely testified that the deed was not delivered and thus secured a finding to that

effect by the appellate courts. On this trial, at first, he gave the same testimony until confronted by a letter found by the Bank's auditors in the files of the Royalty Company, showing its delivery, with memorandum thereon in Scannell's handwriting. (R. 785-786.) Then he admitted the letter and the delivery. (R. 786.)

Discussing the decision of the Commisison of Appeals by Judge Taylor, Judge Sibley says:

> *"That decision is not res adjudicata because it was not a final judgment. It affirmed no judgment but reversed it and directed a new trial.* • • • *No doubt it would have been accepted as the law of the case on the same facts upon a retrial in the state court, and ought to have been so regarded in the District Court.* • • • and this court is its successor as the appellate tribunal for this case. *It has the same power to correct what may be clearly wrong.*" (95 Fed. (2d) 675.) (Italics ours.)

Judge Sibley again announced this principle in his opinion on rehearing, as follows:

> "• • • we have the same right and *duty* to declare or *re-declare* the law of *this case* that the Supreme Court of Texas would now have if *the case* had not been removed. • • • The opinion in the Wichita Royalty Company Case was reviewed and explained as 'an action where it was charged *that the Bank actively participated in the spoilation of the trust fund and knowingly received a part of the fund to itself in payment of the trustee's individual debt to it.' We have held the bank liable in so far as it did that.* Since in the Quanah Case the Supreme Court holds that the law of Texas is what for want of a better

term we may call the general law on the subject involved here, and accordingly adopts rules generally followed in other States, *we think our conclusions are in line with the law of Texas and that there is no occasion for a rehearing.*" (97 Fed. (2d) 250, 251.) (Italics ours.)

There is no evidence or findings that there was any actual participation or knowledge in Peckham's wrong by the Bank or its officers, unless the receipt of funds, determined by a method of tracing into Peckham's individual account, could be said to constitute notice of Peckham's misuse of trust funds.

POINTS OF LAW

I

Does the decision of the Texas Supreme Court on a former appeal upon different facts control as the law of the case, and, if so, is this decision contrary to the decision of the United States District Court and the Circuit Court of Appeals?

II

Is the opinion of the Circuit Court of Appeals in this case in conflict with the law of Texas, as declared by the statutes and opinions of the Supreme Court of this state?

III

This being a suit against a national bank, an agency of the National Government in relation to its primary duty—that arising from the receipt of deposits—the defi-

nition of that duty is to be found in the national laws, especially if as an incident to that duty, it is held that there is an affirmative duty in the nature of suretyship to supervise all accounts of fiduciaries, although there is no bad faith and no knowledge of wrongdoing. Therefore, the case of *Erie Railroad Company v. Tompkins* has no application.

IV

If as contended by petitioner, that notice of the trustee's wrong is conclusively imputed to the Bank on and after the Bank receives payment upon the individual debt of the trustee from funds that can be traced into the individual account of the trustee from a deposit of trust funds, do not the facts as found by the trial court, that the first of such receipts was had on January 19, 1927, require an affirmance of this case, in that the total items complained of after such date did not equal the amount of admitted indebtedness owing by the trust to the Bank?

SUMMARY OF ARGUMENT

I The doctrine of the law of the case has no application. (pp. 15-24.)

(a) The judgment of the Supreme Court of Texas on the first appeal remanded the case for a new trial in its entirety; therefore, it had no finality. (p. 15.)

(b) The doctrine of the law of the case does not have the sanction of the Supreme Court of Texas. (pp. 17, 18.)

(c) The law of the case has no application where

new parties are made and new issues and evidence introduced. (pp. 19-23.)

II The test of a bank's liability in the handling of accounts of fiduciaries, as laid down by the Supreme Court of Texas, is good faith, and the opinion of the Circuit Court of Appeals on this question is in harmony with the laws of Texas. (pp. 24-33.)

(a) The more recent decision, the case of *Quanah, Acme & Pacific Railway v. Wichita National Bank & Trust Company*, 127 Texas 407, announces this rule. (pp. 24-31.)

(b) The statutory test in Texas is good faith, as defined by Article 2475b, Texas Civil Statutes. (pp. 32, 33.)

III The suit being against a national bank on a deposit liability, the case of *Erie Railroad Company v. Tompkins* has no application. (pp. 33-42.)

IV An affirmance of the case is required, even under the petitioner's theory. (pp. 43-49.)

(a) The trial court found that the first receipt of trust funds by the Bank was on January 19, 1927. (p. 46.)

(b) All subsequent transfers from the Royalty account to the individual account of Peckham since that date do not aggregate the amount of the Royalty Company's admitted indebtedness to the Bank. (p 48.)

THE LAW OF THE CASE

Does the original opinion of the Supreme Court constitute the law of the case?

This opinion must be considered not only along with the opinion on rehearing but also in connection with the opinion on rehearing in the *Quanah, Acme & Pacific Railway Company v. Wichita State Bank & Trust Company*, supra, wherein the decision in the case of the Wichita Royalty Company was expressly referred to and was explained as involving an action where it was *charged* that the Bank actively participated in the spoilation of the trust fund and *knowingly* received a part of the fund to itself in payment of the trustee's individual debt to it. (127 Texas 421, 422.)

The Supreme Court of Texas remanded this case in its entirety. No final decree of any kind was entered and under the Texas statutes the reversal by the Supreme Court placed the parties in the same position as they occupied before the cause was tried. *Lauchheimer & Sons v. Coop* (Tex. Civ. App.), 86 S. W. 57; *Texas Revised Statutes*, Art. 1771.

The petitioner does not complain of the judgment of the Circuit Court of Appeals in reversing the case, its complaint being that the Court did not follow as "the law of the case" the former opinion of the Supreme Court in this very case, and the assumption on the part of the Circuit Court of Appeals that it, as the successor, as the appellate tribunal in this case, had the power in like manner, as the Supreme Court of Texas would have, to correct what might be clearly wrong. (See Petitioner's Brief, p. 12.)

It is conceded by most, if not all, of the courts that a question considered and determined on a first appeal of a case is as a general rule the law of the case on a

second appeal, and, consequently, not open to re-examination. There are numerous exceptions to this rule and the modern trend of the decisions is that if the prior decision is "clearly, principally, emphatically, or palpably erroneous, it is competent for the Court to correct it on a second review. (See notes, *United States Annuity & Life Insurance Co. v. Peak*, 1 A. L. R. 1270, and cases cited.)

The doctrine of the law of the case has had scant sanction or approval by the Supreme Court of Texas, and the United States courts have never held that the law of the case runs from State to Federal courts. *King v. Worthington*, 104 U. S. 44.

It has long been established in Texas that the appellate court is not bound on a second appeal by its pronouncement in its opinions rendered on a previous appeal. In an early case, *Layton v. Hall*, 25 Texas 204, the Supreme Court held that its former opinion was insupportable on principle and should be overruled.

Again, in the case of *Reeves v. Petty*, 44 Texas 249, the Supreme Court on a subsequent appeal held that its prior decision had overturned an established rule of property, and therefore should be disregarded.

In the case of *Burns v. Ledbetter*, 56 Texas 282, where on the original appeal the case was reversed and remanded, the Court said that, despite its previous opinion, the question should be regarded as still open, and that court could and should re-examine the same.

Judge Brown, of the Supreme Court of Texas, in the case of *Kempner v. Huddleston*, 90 Texas 182, 37 S. W. 1066, tersely states the rule:

> "To the first question propounded, we answer that the former decision of the court in this case constitutes no bar to the consideration of the same question on a second appeal."

As said in the case of *Meyers v. Dittmar*, 47 Texas 373, where the same court in another case had laid down a different rule:

> "But the law, as ruled in the cases, is, unquestionably, contrary to the practice of this court, and has never received its sanction or approval. (40 Tex. 225; 25 Tex. 204;) and, at present, at least, we see no reason for its adoption."

Now, in this case it appears that the Supreme Court of Texas inadvertently overlooked and nullified a plain statute of the State, to wit, Art. 7425b. This statute defines precisely the duty of one dealing with a trustee and makes good faith the test.

The Supreme Court of Missouri held that where that court on a former appeal had overlooked a statute which was controlling it could clearly correct such error on a second appeal:

> "But where such reasons are clearly shown, and especially where the former ruling inadvertently overlooked and nullified a statute, or overruled some sound and well-settled principle of law, such as was done by this court on the former appeal in this case, we should have no hesitancy whatever in overruling the former decision and re-examining on the second appeal."

The law of the case is a rule of practice and its ordi-

nary signification does not run from the State to Federal court. *King v. Worthington*, 104 U. S. 44.

As the successor appellate tribunal, unquestionably the Circuit Court of Appeals had the same right to declare or redeclare the law of Texas, as would have had the Supreme Court of Texas had the case remained in the State Court.

If, as established by the Supreme Court of Texas, that court could on a second appeal re-examine into and correct palpable errors arising on the first appeal, unquestionably the Circuit Court of Appeals, as the successor appellate tribunal, would have like power. Unless this follows, the courts of the United States would be compelled to follow error. Such is not the effect of the requirement as laid down in the case of *Erie Railroad Company v. Tompkins*, 82 L. Ed. (Advance Opinions) 787.

Where the rule as to the law of the case is applied, it is held that it has no application where new parties are made who have substantial rights.

Marsh v. Marsh, 112 So. 189, 215 Ala. 571;
State v. Red River Lumber Co., 195 N. W. 495, 157 Minn. 7;
Farmers' State Bank of Texhoma, Okla. v. Clayton Nat. Bank, 245 P. 543, 31 N. M. 344;
Missouri, K. & T. Ry. Co. v. City of Tulsa, 238 P. 452, 113 Okl. 21;
Phez Co. v. Salem Fruit Union, 233 P. 547, 113 Or. 398;
Lee v. Powell, 52 So. 214, 126 La. 51.

In this case, after the same had been remanded and

after the City National Bank of Wichita Falls had closed its doors (at the time of the National Banking Holiday) and had gone into voluntary liquidation, the Liquidating Agent and the new bank (City National Bank in Wichita Falls), which took over the assets of the old bank, were made parties defendant; also its former directors were made parties defendant for alleged violation of their duties as trustees under Title 12, Section 91, U. S. C. A. It was in consequence of these Federal issues that the case was removed to the Federal Court. As to the duties of national bank directors defined by statute, they are governed by Federal laws. *Jones Bank v. Yates*, 240 U. S. 541.

So, also liabilities visited upon the new bank, involving its relations to the old bank, which had gone into voluntary liquidation. *Federal Reserve Bank v. Omaha Nat. Bank*, 45 Fed. (2d) 511, 515; *Steele v. Randall*, 19 Fed. (2d) 41.

Another exception to the rule known as "the law of the case" is this: It necessarily has no application to issues not considered originally, and has no application if the facts are substantially different, so as to affect questions of law actually decided. There was no direction that a judgment be entered in favor of the Royalty Company, but only that the facts be reinvestigated to determine the issues of fact regarding the actual participation by the old bank in the alleged wrongdoing of Peckham.

Ultimate issues not in the case when before the Supreme Court of Texas are as follows:

First: It is stated by petitioner that the Supreme

Court passed on the matter of limitation. This is incorrect certainly as to the items not in the original suit but in the amended pleading. Peckham died November 7, 1929. When a trustee dies, limitation begins to run, because the trust terminates and the duty of accounting then arises. *Spallholz v. Sheldon*, 216 N. Y. 205, 110 N. E. 431; *Clarke v. Johnson*, 85 U. S. 493, 18 Wallace Aside from that, by February, 1931, (date of original cross action) Scannell knew of Peckham's alleged unfaithfulness and wrote the shareholders he had discovered such. (R. 678.) This put them upon every inquiry and started limitation. *Phillipi v. Phillipe*, 115 U. S. 151 A suit in 1937 was too late.

The original cross action, filed February 14, 1931, sued for an alleged deposit liability, but attacked no transaction prior to October 8, 1925. The amended cross action, filed June 18, 1936, (R. 33) or more than four years after the account was closed and after the Royalty Company knew that the Bank denied any liability on account of deposits or otherwise, involved approximately $130,000.00 of additional items. Any recovery of these was clearly barred by limitation. (See *U. S. F. & G. Co. v. Union Bank & Trust Co.*, 228 Fed. 448 (C. C. A. 6); *United States v. Wardwell*, 172 U. S. 48; *Dickinson v. Leominster Savings Bank*, 152 Mass. 40.)

These items were not recoverable for additional reasons:

1. $31,500 thereof covered salary checks drawn by Peckham in his own favor and honored by the Bank. These salary items ran back to the time of his appointment from

January 2, 1923, up to the time of his death, but were not included in the original suit.

2. Certain of the items sued for in the amended pleading covered royalties as follows:

At the time the original suit was filed, Scannell elected to keep these royalties. Later, some six years, he says that he desires to change his position and reject these royalties. (R. 1181-2; 809.)

The Supreme Court of Texas did not hold (and we submit that no court will hold) that an election once made may be rejected some six years afterwards, especially where oil properties are involved.

Another and to our mind important fact not before the Supreme Court of Texas originally is this: The Record upon the first trial carried back the account of George W. Peckham as an individual only to October 8, 1925, and the opening deposit was of a $5,500 check drawn on the Royalty Company.

On this trial the account of Peckham as an individual was shown to have its inception long prior to his appointment as trustee in lieu of R. R. Robertson, and it was further shown that the account was extremely active.

It was further shown on this trial that Scannell had been with Robertson and that the method of business pursued (whereby monies drawn were drawn from the Royalty Company account and deposited to the individual account) had been pursued by Robertson while conducting business in the Security National Bank. This, of course, was not known to the City National Bank, but is a circumstance indicating approval of the method of doing

business. The Record does show, however, that very shortly after Peckham became trustee this practice, so started under Robertson, was continued by Scannell and Peckham, and that checks were returned monthly.

It is now claimed that the stockholders never audited the account of either Robertson or Peckham (they were clearly under the duty of auditing Robertson's account after he resigned, if they wanted to complain of his conduct). But this want of audit was a matter with which the City National Bank, in the nature of things, was not familiar. It, as a reasonably prudent person, looking to the appearance of things, had a right to presume that the method pursued for over two years prior to the time that any complaint can now be made had met with the express approval of the stockholders.

We quote from the opinion of the Supreme Court of Texas on rehearing in the *Quanah, Acme & Pacific Case*, as follows:

> "This bank had no actual knowledge that Hawkins was embezzling the funds of his principal. We think such a record falls far short of presenting facts legally sufficient to show that this bank acted in bad faith in purchasing these bills. In fact, we think that we have a right to presume that ordinarily careful people look over their bank accounts frequently. Empire Trust Co. v. Cahan, 274 U. S. 473, 47 S. Ct. 661, 662, 71 L. Ed. 1158, 57 A. L. R. 921. We quote the following from the opinion in the Cahan case: 'Careful people generally look over their bank accounts rather frequently'."

We submit that a practice which met with the apparent approval of the shareholders of the Royalty Company

for over two years should not, as the Supreme Court of Texas indicates, in a case where the facts were presented, be subsequently produced as a basis to show wrongdoing. If reliance thereon negatives bad faith in the one case, it should in the other.

The above are in addition to matters heretofore mentioned as being new matters arising on this trial.

Williams vs. Conger, 125 U. S. 397, strongly relied upon by petitioner, is a case wherein the Supreme Court of Texas had finally passed upon the admissibility in evidence of a certain power of attorney dealing with lands in Texas (falling probably within the binding effect of a rule of property). The Supreme Court of the United States agreed with the correctness of the holding of the Supreme Court of Texas, but stated that nevertheless it felt bound to recognize this final decision. No Federal statute to this effect is cited.

This case has been referred to by the Supreme Court of the United States only on one other occasion (so far as we have been able to ascertain), in the case of *Pierce v. Tennessee Coal, I. & R. Co.*, 173 U. S. 1.

Did the Circuit Court of Appeals fail to follow the decision of the Texas Supreme Court, as well as the statute law of Texas in deciding this case?

To determine what is the law of the State in accordance with the Erie Railroad decision, we must not look alone to a single decision of the State but to the whole body of the law on the subject as laid down by the statutes and the decisions of that state. If the decisions of the State, as announced by its highest court on a subject,

are uncertain, confusing, or in conflict, then it is the duty of the Supreme Court of the United States to reconcile the conflict and to clarify the confusion, as if it were the Supreme Court of such state. *Waggoner Estate v. Wichita County*, 273 U. S. 566.

The case of *Wichita Royalty Company v. City National Bank*, 127 Texas 158, was considered by the Supreme Court along with and at the same time as the case of *Quanah, Acme & Pacific Railway Company v. Wichita State Bank & Trust Company*. Both cases were argued at the same time and decided at the same time on original submission. Each case involved similar questions and the original decisions in each case were in accord.

In the Quanah, Acme & Pacific Railway Company case only one question was involved,—whether or not the facts alleged constituted such notice as to incite inquiry and suggest warning.

In the Wichita Royalty Case it was charged and evidence was offered to support three basic grounds of recovery. First, actual participation with and the knowledge on the part of the Bank and its officers, of the trustee in misappropriating trust funds. Second, receipt of funds belonging to the trust by the Bank in payment of the trustee's individual debts. Third, that the Bank was possessed of knowledge if reasonably inquired into would have enabled it to have known the purpose of Peckham's acts in withdrawing funds from the account of the Royalty Company and depositing the same to his personal credit, that is, constructive notice. (R. 1192; see Royalty Company's cross petition in State Court, R. 1183-1212.)

In the first decision of the Quanah, Acme & Pacific

Railway Company Case, the Commission of Appeals, through Judge German, said:

> "The decisions are practically in accord, in all cases involving deposits by fiduciaries, in holding that a bank receiving a check and placing it to the personal account of the fiduciary, is liable if there are surrounding facts and circumstances of which the bank has *knowledge* indicating that the transaction involves a conversion and which are sufficient to charge it with the duty of inquiry, and we so hold." (89 S. W. (2d) 391, par. 4.) (Italics ours.)

By the same logic it was said in the case of *Wichita Royalty Company v. City National Bank*, 127 Texas 176, 89 S. W. (2d) 403:

> "The bank and Harrell had constructive knowledge of Peckham's dishonesty, and inquiry pursued with reasonable diligence would have disclosed the facts showing Peckham's lack of authority and breaches of trust."

In the decision of the Quanah, Acme & Pacific case on rehearing this doctrine was repudiated and the liability of a bank was placed upon whether or not it acted in good faith. The Court says:

> "To render the bank liable it must have knowledge of the trustee's intention to misappropriate the funds." (127 Texas 421.)

And again:

> "In view of this ruling we have found it necessary to choose between the conflicting decisions, and announce the general rule which we think should be

followed in this State. This we have done." (127 Texas 423.)

The Supreme Court refers in its opinion to the Royalty Case. It says:

"Also, we have again carefully reviewed the opinion in the Wichita Royalty Co. et al v. City National Bank of Wichita Falls case, 127 Texas 158, 89 S. W. (2d) 394, decided by this court on the same day the case at bar was originally decided. The Wichita Royalty Company case involved an action where it was charged that the bank actively participated in the spoilation of the trust fund and knowingly received a part of the fund to itself in payment of the trustee's individual debt to it. The general principle of law involved in the Adoue & Lobit case was involved in the Wichita Royalty Company case, supra. We are satisfied with our opinion in the Wichita Royalty Company case as explained by our opinion on rehearing in that case." (127 Texas 421, 422.)

On rehearing in the Royalty Case the Court did not decide issues of fact as finalities. It says:

"It is an open question upon another trial of the case within the principles of law stated in the opinion on original hearing, whether the Bank first acquired knowledge of Peckham's dishonesty on November 17, 1925. * * *

"It is not intended by anything said in the original opinion to foreclose upon another trial the question of whether the items contended by the Bank to constitute the $5,500 were used for authorized Trust purposes; or to foreclose any purely fact finding that may be made from the evidence that may be adduced

upon another trial. The suggestion in the original opinion that an audit should be made for use upon another trial, and the statement that the various sums therein referred to were not stated as finalities, were indicative of such intention." (127 Texas 184, 185.)

The Court then refers to the case of *Steere v. Stockyards National Bank*, 113 Texas 387, as controlling, which case involves nothing but the restoration of what the bank had itself received.

Under the Texas practice it is important to consider that the appeal of the Wichita Royalty case was from an instructed verdict. It is the settled law in this State that, if an issue of fact is raised, either in law or in an equity case, such issue is triable to a jury. *Joske v. Irvine*, 91 Texas 574.

In the Royalty Case there were allegations made and proof offered to support the charge that the Bank actually received to itself a part of the trust funds. There were also allegations made and proof offered to support an actual participation on the part of the Bank and its officers, with knowledge on their part that the trustee was misappropriating funds belonging to the trust.

It is these two grounds of recovery that raised issues of fact triable to a jury in the State Court and before the Chancellor in the United States Court.

A reference to the practice before the Supreme Court in such cases is, we consider, helpful. Under the Constitution and statutes of this State the judgment of the Courts of Civil Appeals is conclusive upon the facts. The Supreme Court can only pass upon the questions of law.

It must accept as conclusive the facts found by the Court of Civil Appeals. *Texas Constitution, Art.* 5, *Sec.* 6; *Revised Statutes of Texas, Art.* 1820; *Revised Statutes of Texas, Art.* 1756; *Choate v. San Antonio & Aransas Pass Railway Company,* 91 Texas 406.

The facts upon which the Supreme Court based its decision were found by the Court of Civil Appeals in the case of *Wichita Royalty Company v. City National Bank,* 74 S. W. (2d) 661, on rehearing 682, 683. It was held by the Court of Civil Appeals that the evidence did not justify a submission of the Bank's knowledge or its participation to the jury. That Court said:

> "The full import of that evidence was to warrant a surmise or suspicion of wrongful collusion by Harrell with Peckham in a scheme by the latter to misappropriate trust funds, in spite of Harrell's positive testimony to a contrary effect, and therefore it amounted to no more than a scintilla of proof, which was insufficient as a matter of law to support the charge so made against him personally." (74 S. W. (2d) 671, par. 6.)

Therefore, the final decision of the Supreme Court must be considered in the light of whether or not there was evidence to support any of the grounds of recovery asserted by the Royalty Company, as the settled law in Texas is:

> "Whether there be any evidence or not is a question for the judge; whether it is sufficient is a question for the jury." (Choate v. S. A. & P. Ry. Co., 91 Texas 409.)

If the test of a bank's liability in handling accounts

of fiduciaries is measured by good faith, then it is a question of proof and not of presumption. It is essential, in order to establish a bank's liability, to prove knowledge. Receipt of trust funds for the payment of the individual debt of the trustee might under certain circumstances establish knowledge of misuse of such funds.

If the trustee issues a check on the trust account to the bank for his individual note, the bank would know that it was wrong. If, as in the *Adoue & Lobit* cases, 104 Texas 379, the bank knowingly received trust funds in payment of the individual debt of a guardian and in the same transaction permitted the guardian to pay another individual debt, such as was held by the court, would constitute knowledge, because the payment to the third party was a part of the same transaction where the bank received to itself trust funds and partook of the same color and character.

On the other hand, as here, where the trustee paid his debt to the bank from his personal account, where, according to a method of tracing, it might be found that some of the funds received by the bank were trust funds, and the bank by indirection received a part of the trust funds, would that establish knowledge on the part of the bank? We think not, especially under the circumstances here, where the deposits to Peckham's account of trust funds were comparatively small in relation to his total deposits during the period of time.

Over this period Peckham had deposited to his personal account a total of $1,600,000. Valuable royalties retained by the Royalty Company had been paid for by him and reimbursed to him by the Company, about which

there is no complaint. The amount of funds traceable to the Bank during this seven-year period in payment of Peckham's individual indebtedness is insignificant compared with the total items involved.

Wallace, the Royalty Company's auditor, by using salary checks and other items, about which there is no substantial dispute as to their rightness, arrives at a total of $10,713. (R. 2945.) Lambert arrives at the sum of $1,807.11, the first item of which was January 19, 1927. (R. 1443; Plaintiff's Exhibit 211.)

The Supreme Court of Texas does not and cannot lay a yardstick as a measure to determine the bad faith or guilty knowledge of the banker. The law is not static. It must adjust itself under established principles of liability to the varying facts of each case.

This is the decision in the *Q. A. & P. Ry.* case on rehearing.

There is a well-recognized, different rule as to a bank's liability to restore trust funds received in payment of a trustee's individual liability. In such a case the bank is put upon inquiry before it receives to itself monies belonging to another. *Steere v. Stockyards National Bank*, 113 Texas 387; *Union Stockyards National Bank v. Gillespie*, 137 U. S. 411, 34 L. Ed. 724.

This rule should have no application where payments are made to third parties. The reason for the rule that a bank must restore the funds received from a trustee or agent that belong to another is a rule of fundamental justice that the bank has no equity superior to the true owner.

THE TEST OF GOOD FAITH IS STATUTORY IN TEXAS

Art. 7425b, Texas Civil Statutes, provides:

> "Whenever one shall actually and in good faith pay a sum of money to a trustee, which the trustee is authorized to receive, he shall not be responsible for the proper application of the money, according to the trust; and any right or title derived from the trustee in consideration of such payment shall not be impeached or called in question in consequence of a misapplication by the trustee of the money so paid."

In the first decision of the case of *Quanah, Acme & Pacific Railway Company v. Wichita State Bank & Trust Company*, 89 S. W. (2d) 390, a distinction was made in the payment by a bank over the counter to a fiduciary on his check and the deposit of the funds to his individual credit. This distinction was followed in the *Royalty Company* decision, 89 S. W. (2d) 398, but the Supreme Court of Texas on rehearing in the *Quanah, Acme & Pacific Railway Company* case disregarded this distinction:

> "As appears from the petition, this Bank did not pay actual cash money for these bills at the time it purchased them from Hawkins. It did, however, pay the equivalent of money, because each time it purchased a bill it passed the proceeds thereof in full to Hawkins' individual credit on the books of the Bank." (127 Texas 414.)

When the Bank deposited to Peckham the proceeds of the several checks, under the rule in the *Quanah, Acme & Pacific case*, it purchased these checks and became the owner thereof. Thus i actually paid the various sums of

money to a trustee. Peckham, as such trustee, had the power and authority to receive these funds and, under the plain wording of the above statute, the test is good faith instead of constructive notice.

NATIONAL LAW SHOULD CONTROL

This Court has held that no State—at least through statute—may so change the contract of a national bank arising out of a deposit as to conflict with the general purpose of the national banking system. (See *First Nat. Bank v. California*, 262 U. S. 366, 67 L. Ed. 1030, and cases there cited.)

The crippling effect upon uniformity of the duties arising from deposits made in national banks may be just as effective when the encumbrance is due to a view of the general law as when it is due to the enactment of a statute. The philosophy underlying the rule of *Erie Railroad Company v. Tompkins*, *supra*, is that there should be uniformity in each state in the administration of general law, whether the cause be in the State or Federal Court. In respect to the duties of the national agencies, such as national banks, the law should be as nearly uniform as possible throughout the national system. Compare *Lyeth v. Hoey*, decided December 5, 1938. And as to national banks, their primary duties are those incident to the receipt and payment of deposits. It is believed that if the state decision here, as construed by the petitioners, be given effect, an affirmative duty of supervision (as opposed to a negative duty of non-participation), in the nature of a contractual duty, will be added to the duty ordinarily incident to the receipt of a deposit by a national bank in Texas.

A Federal charter, of course, does not license any banker, or bank, to become a party to a defalcation by any person, violative of any fiduciary relation (whether as executor, guardian, agent, partner, corporate officer or trustee) when with *actual knowledge* of intended defalcation a payment be made to the fiduciary. (Remembering that action with sufficient notice to amount to bad faith is equivalent to knowledge.) But, as pointed out in *Childs v. Empire Trust Company*, 54 Fed. (2d) 981 (C. C. A. 2), "It would be impossible to do business with a fiduciary at all if a bank were required to follow the cross entries between his several accounts; to decide whether he was thieving and then honor his checks."

The petitioners state "the Supreme Court of Texas bottomed the liability of the bank on constructive notice visited upon it." (Brief, p. 17.)

The so-called *constructive notice* consisted of this: There were two accounts in the City National Bank,—one an account in the name of Wichita Royalty Company accompanied by a contract of deposit to recognize a check drawn on this account by Peckham. That was the very undertaking agreed to be performed by the contract of deposit. There was also an account in the name of Peckham as an individual. In October, we will say, Peckham drew a check on the Royalty Company account, took this to a receiving and paying teller and deposited the same to his individual account. At the end of October, and of each succeeding month up to the time hereinafter mentioned, both the Royalty Company and Peckham were sent statements with the checks accompanying. Some four or five months later Peckham went either to an of-

ficer or to the note teller of the bank and tendered a check drawn on his individual account in payment of a note due by him as an individual to the bank. The check was accepted. (Consider *Harvard Law Review, Vol.* 34, *p.* 480.)

According to the petitioners, when the original deposit of $1,000.00 was made in the personal account by check drawn on the Royalty Company account, the bank was thereby put upon *knowledge* of the fact that the personal account was a "commingled account."

The Texas courts uniformly hold that there was no wrong committed in the act of permitting this deposit; hence it seems wholly illogical and improper to treat the personal account thereafter as a "commingled" account merely because there was a deposit lawful (from the standpoint of the bank) of money drawn from the Royalty Company's account and deposited into the personal account. It seems to us to be erroneous to say that there was a "commingled" account (from the standpoint of the bank) when the bank had a right to assume that the money drawn from the royalty account ceased to be royalty money and became personal money. (On this question see *Maryland Casualty Company v. City National Bank*, 29 Fed. (2d) 662.)

In the case of *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759, the New York Court held that the form of the check, in connection with the surrounding circumstances, negatived the idea that the deposit of the check drawn on the account of the executor was intended to vest title into the executor as an individual. As executor's powers are, of course, so limited that one who

runs may know them. The circumstances here are such as to negative the notion that the deposit of a check drawn on the Royalty Company account into the personal accounty of Peckham was not such as to change the character of ownership. These checks were in voucher form. They evidenced expenditures. While the voucher did not accompany the deposits, still, if the bank was called upon to inquire into the vouchers (as petitioners claim), the vouchers would have shown them to have been intended to cover expenditures on behalf of the Trust. A bank is not called upon to go beyond its own channels, *M. & P. Bank v. Clifton*, 33 S. E. 750.

There was nothing to indicate an intention that the money should remain that of the Trust.

Pursuing the illustration further: Although there were innumerable receipts of deposits and checks drawn between the deposit in October and the note payment four or five months later, the petitioners say that the Supreme Court of Texas held that when the bank accepted the payment from this so-called "commingled" account and if an accounting between Peckham and the Royalty Company had shown that the original deposit was wrongful and was still in the "commingled" account, and that any part of it was made upon the the $1,000.00 applied on the note, then the bank was liable to repay that portion so applied on the note. (We may grant the correctness of this for argument's sake on the theory that the bank having taken something on an existing indebtedness and not having changed its relation upon the appearance of things had no higher title than had the payor. See *Beaver Boards Company v. Imbrie & Company*, 287 Fed.

163; *Fulton National Bank v. Hosier*, 295 Fed. 611 (C. C. A.) and the quotation from *Shotwell v. Sioux Falls Savings Bank*, 34 South Dakota 109, set forth in the opinion of the Supreme Court of Texas on motion for rehearing in the case of *Steere v. Stockyards Nat. Bank*, 113 Texas 401.

The *duty* of non-participation is a negative duty. *Perry on Trusts, Sec.* 122, p. 177, 7th Ed.; *American Surety Company v. Waggoner Nat. Bank*, 83 Fed. (2d) 102 (C. C. A. writ denied).

The petitioners claim that the Supreme Court of Texas has held that from and after the acceptance of this payment, which payment thus consisted in part of money wrongfully coming from the Royalty Company account, then the bank has an *affirmative* duty of supervision, not only with respect to money that may be paid to the bank upon a present indebtedness, but also with respect to *every dollar* deposited in the Royalty Company's account and drawn out of the Royalty Company's account. The theory of this supervision proceeds, it is said, from the constructive notice (not knowledge) visited upon the bank because of the duty to return a portion of the $1,000.00 so paid on the indebtedness, in that the bank is thus charged to know that the fiduciary had become unfaithful, that he cannot be relied upon and that he must be watched not only for defalcation, but he must be watched to see that his conduct is not violative of any instructions given by his principal, and that he acts strictly intra vires. (In this latter respect, if the petitioners correctly construe the opinion, the Supreme Court of Texas has gone beyond the case of *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759, where the bank was held to be liable for

additional defalcation and not for investments merely beyond the scope of the authority.)

The duties which a national bank owes as an incident to deposits must be viewed from a practical standpoint. Banking transactions must be made with haste; they must be based upon a reposing of confidence. It is violative of all notions that a bank should undertake any duty of supervision until, as was early held, the transaction is one "designed and stipulated for" the benefit of the bank. *Gray v. Johnston*, L. R. 3, Eng. & Irish Appeal Cases 1; *New Amsterdam Casualty Co. v. Banking Company*, 175 Atl. 609, 117 N. J. E. 264. How is it possible for a national bank to function (if they must keep up with one fiduciary account, they must keep up with all) so as to be in a position to audit the books of fiduciaries in respect to transactions in the past to determine the honesty or dishonesty of a given payment from out of a personal account merely because previously thereto there has been money, presumably properly disbursed, deposited from a fiduciary account into the personal account?

We do not believe the Supreme Court of Texas so held finally; but we submit that, if so, there have been placed affirmative duties of supervision in the nature of contracts incident to the contract of deposits which so cripple and encumber the functions of the national bank as to be violative of the federal functions of the national banks. The national banks now constitute a system. They are interdependent. They are affected by the Federal Deposit Insurance. When in liquidation, they are under Federal supervision. Depositors as such should not be called upon to share with creditors whose claims are

based in substance upon a relation of suretyship undertaken by a national bank,—an affirmative duty of supervision, otherwise of liability. A national bank may not ordinarily become a surety, a guarantor or an indemnitor. What happens to one national bank affects the others. The idea is one of uniformity. The law to be applied here should be the Federal conception of duties and not those of the several states.

While Congress, in authorizing national banks to receive deposits, did not expressly define the relations that would arise therefrom, it evidently had in mind some relationship to be uniform throughout the country. It did not have in mind necessarily any duty of supervision on some theory of constructive notice, first established in the case of Bischoff v. Yorkville Bank in the year 1916 in New York, largely repudiated elsewhere, *Maryland Casualty Co. v. Bank*, 29 Fed. (2d) 662; *New Amsterdam Casualty Co. v. National Bank*, 175 Alt. 617, 117 N. J. E. 264, expressly legislated against in Uniform Fiduciaries Act. See reporter's notes quoted under Section 905 of *Bogert on Trusts and Trustees*. That act makes bad faith "the subjective test of honesty and not the objective test of care.")

At any rate, the added duty here is such as to be inconsistent with the general national system and should be rejected.

If the national banks are under the affirmative duty here said to be placed upon them, they cannot handle with safety any agency or fiduciary account and at the same time lend money to any agent or fiduciary. There is no practical way for a bank to trace deposits, so as to know that an agent who has theretofore taken money from his

agency account and put it into his personal account, and later pays his personal debts with this money. Furthermore, there is no pay incident to this service. (See statement of the Supreme Court of Minnesota as to this, *Rodgers v. Bankers' Nat. Bank*, 229 N. W. 90, 93-94; 179 Minn. 197.)

The bank may be called upon to return the money so received simply because it has no equity higher than that of its rightful owner, but this should be the complete measure of the duty. In the *Rodgers Case, supra*, it is true that the bank received no payment on personal indebtedness, but in the case at Bar the bank did not knowingly receive a payment on a personal debt. Receiving a benefit may be evidence of knowledge. But an inadvertent benefit, though it ought to be returned because unaccompanied by an equity, is not knowledge or evidence thereof or of bad faith. The very word participation implies one or the other. Knowledge involves "consciousness, i. e. presence in the mind of a given fact." *Wigmore on Evidence, Sec.* 244. There was no way for the Bank to be conscious of it here. They could have refused to have done business at all, but that would put an end to the functions of national banks. (See the *Rodgers Case, supra*, p. 93.) Instances in the conduct of banks must multiply themselves by the thousands where deposits are made in personal accounts of moneys formerly agency in nature. Must each of these be supervised?

All of which leads to the very point we make now that the definition of the duty of a national bank in Texas under this decision as construed by petitioners, is so onerous as to cripple the national banking system and to be rejected.

It is pointed out, however, that certain of the checks were made payable to the bank and *Robbins v. Passaic Nat. Bank*, 109 N. J. Law 250, 82 A. L. R. 1368, is cited to fix liability on these checks. But, as stated, banking law is based upon practical considerations. The checks drawn payable to the Bank were not intended to be credited to the Royalty Company account, for that would have been an useless proceeding. Inquiry must be made of some one as to what should be done with the funds. In the *Robbins Case* there was a principal from whom inquiry could be made. In the case at Bar, there was no one to inquire of save Scannell, who signed most of the checks, or Peckham, who cashed them. There were 1,200 or 1,300 shareholders, no one of whom lived in Texas, scattered to the four corners of the Globe, whose addresses are unknown even now. Inquiry could not be made of them. But, if it could be made of them, of how many must it be made when there is nothing in the declaration of trust making the voice of a majority, or any number, controlling on all? There was nothing to do save either to quit functioning as a national bank or to take the word of Peckham, who was recognized by all to be an honest man and held out by the stockholders as entrusted with all the authority. See the discussion of this question in the *Rodgers Case*, p. 93.)

Besides, the practice of making checks payable to the payee bank for general disbursements was one adopted by Scannell, used prior to the time Peckham ever became trustee. (R. 1465.)

Certainly, further, a bank should not be called upon to know that checks drawn by one authorized to do so and

ostensibly for corporate purposes are violative of instruction (instance an investment in Marlborough property). The ultimate destination of the money can be of no such concern to a paying bank to require it to know that the expenditure is authorized.

The Circuit Court of Appeals stated that the sale of the assets of the Old Bank to the New Bank should stand. Such was a matter not under consideration at all by the Supreme Court of Texas. No attack is made upon that holding in the assignments of error filed here and it should not be questioned.

The case of *Hill v. Wiley*, 3 N. E. (2d) 1015 (petitioner's brief, p. 18), has no application here. That case, and the cases cited, involved situations where notice was brought home to the trust estate receiving the benefit of the stolen money. The case also proceeds upon the doctrine of unjust enrichment. Harrell had no actual notice that Peckham was using trust money in the Marlborough venture, in the first place. But in the second place, and as conclusive of any liability upon the doctrine of unjust enrichment, the rule is well established that a partner, or a co-owner, cannot be held to have been unjustly enriched by contributions to the common estate from out of stolen money, when he himself advances his proportion of the money to the common estate. In such situation he is akin to a purchaser for value and cannot be said to be unjustly enriched, having parted with his own capital on the strength of the appearance of the regularity of the contribution by his partner or co-owner. (See *Gilruth v. Decell*, 16 So. 251; *Englar v. Offutt*, 70 Md. 78, 14 Am. St. Rep. 332; *Dounce v. Parsons*, 45 N. Y. 180.)

DO NOT THE FINDINGS OF THE TRIAL COURT REQUIRE AN AFFIRMANCE?

The petitioner contends that the Bank is conclusively charged with Peckham's fraud when it had received by indirection trust funds on the trustee's individual debt, and that thereafter it was liable for all unauthorized deposits made to the individual account of the trustee from the deposit of trust funds.

The Royalty Company unquestionably owed the Bank a note of $22,000, which represented the balance of two loans,—one of $15,000 and the other of $25,000. Peckham, Trustee, had authority to borrow money and negotiate both of these loans, the proceeds of which was deposited in the account of the Wichita Royalty Company and expended by Peckham, or under his direction. (R. 458, 459.)

A portion of this money was used to purchase the Stephens Royalty and a portion to purchase the Marlborough Addition.

The evidence is undisputed that the bank had no knowledge of the purpose of such loans and the present note of $22,000 represents the balance unpaid.

The Bank was under no duty to look to the proper application of this money. *Texas Statutes, Art.* 7425b; *Bogert on Trusts and Trustees, Vol.* 4, *Sec.* 767; *Jenson v. Toltec Ranch Co.*, 174 Fed. 86.

There is a conflict in the testimony between the Bank's auditors, Carson and Lambert, on the one hand, and the Royalty Company's auditor, Wallace, on the other,

as to when by the method of tracing employed the Bank first received on Peckham's debt trust funds. The result of Lambert's audit shows that the first funds traceable to the Bank, belonging to the Royalty Company, from Peckham's individual account and applied upon Peckham's individual note, was made on January 19, 1927. (Plaintiff's Exhibit 211, R. 1443; also see Plaintiff's Exhibit 210a.)

Lambert testified that on this date Peckham paid the City National Bank the sum of $2,506 by check upon his personal account; that under the Minimum Balance Rule $1,581.41 was from personal funds and $924.81 was funds from the Royalty Company account. He says:

> "That is the first time that the transferred funds under the minimum balance rule was used to pay any part of his personal indebtedness." (R. 1399.)

Carson's testimony, which goes into great detail, corroborates Lambert's. (R. 815-967.)

Wallace's testimony on this question is summarized at page 1704 of the Record. Wallace spent only a short time, as pointed out by the Court. He admits that the Royalty Company's attorney and Scannell helped write his report. (R. 1737.)

The first item in his report, wherein he traces the sum of $390.86, the payment of Peckham's note from the transfer of royalties, is from a royalty purchased by Peckham known as the "Grimshaw," wherein Peckham paid out of his own pocket for this royalty and was reimbursed. This royalty has been retained over fifteen years by the Royalty Company and is still producing, and at the trial

had netted the Royalty Company $8,596. (R. 810.) Wallace says, concerning this item, as follows:

> "The first one I deal with is the Grimshaw, purchased during the early administration by George Peckham, February 12, 1923, is the conveyance to Peckham from Grimshaw. That royalty is repudiated. We have charged Peckham with what he transferred out of the trust funds for the Grimshaw royalty. I have not given Peckham credit for what the Grimshaw royalty cost Peckham when Peckham bought it, I charged it to him—the cost of the Grimshaw royalty of $7,500.00. I have not allowed him any credit for it. Peckham had paid $7,500.00 for the Grimshaw royalty and the Wichita Royalty Company paid Peckham $7,500.00 for it, and if the Grimshaw royalty had not produced a barrel of oil, I would have Peckham owing the Wichita Royalty Company, $7,500.00 under my statement. * * * The Royalty Company, during the lifetime of the royalty, regarded it as their property and received their part of the oil runs, which was considerably more than the original cost." (R. 1741.)

The next item of $279 came out of a salary check. The item dated 2-5-24 of $67.67 was from funds reimbursing Peckham for the purchase of the Wilson royalty. The item of 3-18-24 of $5,500, Check No. 185, was a check payable to B. L. Fain and not to Peckham. The next item of $1,386.92 was from a purchase direct to the Royalty Company of what is known as the Routon Royalty. There was nothing wrong with that transaction. (R. 1751-1753.) The next item is from a salary check. The next item of $10, as well as the one of May 9, 1927, of $10, are extraordinary items. They represent the payment by Peckham to the bank for a safety deposit box, wherein he

drew a personal check of $10 in each instance to pay this rent.

Thus, briefly, is shown the manner of Wallace's investigation.

Under this state of facts the Court found in favor of Carson's and Lambert's testimony. (R. 1928.)

All of the checks deposited to Peckham's individual account from the account of the Royalty Company from and after the 1-19-27 do not aggregate the amount of the plaintiff bank's debt.

With respect to an item of $2,550, which petitioner (p. 5 of its brief) claims that the District Court found as a fact that the Bank had received, this is an entire error on the part of the petitioner in respect to an accurate knowledge of this transaction.

The trial court says in respect to this item:

> "Another item of approximately $2,550.00 is also claimed. * * * I have been doubtful about the $2,550.00. When one is doubtful, and as doubtful as the maze of facts in this case causes, I believe the trust should be given the benefit of it in so far as it concerns a payment out of funds to the depository bank by the trustee on his own debt." (R. 1928.)

The court, as well as the petitioner, wholly misconceives this item and the nature if it, from the undisputed testimony.

This transaction was Defendant's Exhibit 155, R, 1238, a check for the Curlee lands. W. S. Curlee con-

veyed to J. T. Harrell and G. W. Peckham on this date a tract of land adjacent to the City of Wichita Falls for a consideration of $4,814 in cash and the assumption of certain note indebtedness. The deed is shown Defendant's Exhibit 14, R. 483. The proceeds of that check were deposited to the credit of W. S. Curlee. (R. 571.) The Bank received none of the proceeds thereof and the check did not create an overdraft. (R. 582.) Peckham's balance after the payment of this check was $4,888.30.

The following is an analysis of these transfers and the corresponding record and exhibit thereon:

Analysis of all checks payable to City National Bank and deposited to credit of G. W. Peckham's Personal Account January 19, 1927, to time of Peckham's death.

Date	Check No.	(Defendant Exhibit "6" R. 1801) Amount	Purpose Per Voucher Notation		Applied by Peckham To Trust	Date Applied	
1-19-27	571	2,000.00	Marlborough	R 1399 Lambert R-1455	None		Plaintiff Exhibit 212—R 1487
2-19-27	579	2,500.00	Marlborough	R 1455 Lambert	None		Plaintiff Exhibit 212—R 1487
3- 1-27	582	500.00	Bank Note	R 1456 Lambert	500.00	12- 8-26	Plaintiff Exhibit 212—R 1488
3-23-27	591	2,000.00	Bank Note	R 1458 Lambert	None		
6-18-27	620	1,200.00	Bank Note	R 1459 Lambert	1,200.00	8-31-27 10-19-27	Plaintiff Exhibit 212—R 1489 Plaintiff Exhibit 212—R 1491
8-16-27	635	1,500.00	Bank Note	R 1459 Lambert	1,500.00	10-19-27 11-25-27	Plaintiff Exhibit 212—R 1491 Plaintiff Exhibit 212—R 1491
10-14-27	650	2,400.00	Bank Note	R 1459 Lambert	2,400.00	11-25-27 2-15-28	Plaintiff Exhibit 212—R 1491 Plaintiff Exhibit 212—R 1491
11-25-27	657	1,800.00	Bank Note	R 1459 Lambert	1,721.33	2-15-28	Plaintiff Exhibit 212—R 1491
4- 6-28	702	548.12	Expense Refund		548.12		
11-20-28	710	1,850.00	Bank Note	R 1459 Lambert	None		Plaintiff Exhibit 212—R 1491
9-27-28	752	424.66	Bank Note	R 1459 Lambert	424.66	9-27-28	Plaintiff Exhibit 212—R 1491
TOTALS		16,722.78			8,294.11		

RATIFICATION AND ELECTION

When Peckham died, Scannell made an audit and arrived at an indebtedness of approximately $19,000 claimed to be owing by Peckham to the Trust (R. 806, 807). He elected to accept Marlborough, informed Harrell of the Royalty Company's ownership, and asserted ownership and control over these properties. At that time the Marlborough properties, adjacent to the principal residential section of the fast-growing city of Wichita Falls, was a valuable property. (R. 457.) After the depression came along, Scannell repudiated the ownership. Most of the royalties complained of now have been held by Scannell, as trustee, over a period of from five to nine years. The Stephens Royalty, which is complained of, was sold by Scannell and the proceeds applied upon the note indebtedness. It is apparent that Scannell, at the time he elected to receive the Marlborough, he did so for the purpose of saving the Trust's money invested in that enterprise. (R. 1278, 790.) Each and every transaction complained of in respect to the acquisition of royalties, as well as the Marlborough Addition, was fully disclosed by the books and records of the Royalty Company. The acquisition of the royalties were shown to have been reported to the stockholders. The report to the stockholders, which, in the nature of things, should have been made after the acquisition of Marlborough, was missing and unaccounted for (R. 1925). Scannell knew all the facts all the time with reference to the handling of the funds. He initiated and instituted the plan of making checks for disbursements payable to the Bank. (R. 1465.) He knew what every check was for and signed most of them, re-

ceived income from the royalties which he now repudiates and appropriated them to the use of the Royalty Company. He entered into the active management of the Marlborough properties, accepted and received the stock of the corporation, and elected to hold the properties.

We submit that his election is irrevocable and that the case should be decided against the Royalty Company on its entire cross action on the ground of ratification and election. It has been held by the Supreme Court of Texas that a trustee, such as Scannell was, is the alter ego of the company. (*S. C. Tyrell Trust v. Lovell*, ____ Texas____, 27 S. W. (2d) 142.

But it is contended that since there was no power in Peckham to make an investment in the town-lot proposition, there was no power in Scannell to ratify such. Peckham was making an original investment. Scannell was faced with the necessity of having an accounting in the estate of Peckham. When Peckham died, an accounting was essential. Under the laws of Texas, claims against his estate must be filed within twelve months from administration; otherwise deferred. (Revised Statutes of Texas (1925), Art. 3509.)

Some one must act for the Royalty Company in respect to this accounting. The substitute trustee was the only one authorized to do so. All title was in him. Certainly the substitute trustee was not powerless to protect the estate by retaining the Marlborough property, rather than permitting it to be treated as a part of the estate of Peckham to be shared in by all of his creditors. His power, as Judge Sibley points out, is akin to the power of a national bank in emergencies. He became an agent

by way of necessity to deal with the alleged wrong of Peckham, according to his best judgment.

Therefore, inasmuch as this case is a writ of certiorari to review the judgment of the Circuit Court of Appeals, the entire record is before the Supreme Court and it has power to review the action of the Circuit Court of Appeals and direct such disposition of the case as that court might have made of it upon the appeal from the District Court. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 75 L. Ed. 544.

The transactions in this case involve hundreds of items, running over a period of seven years.

Sudden death has called Peckham from the stage and the Chancellor, in reviewing this record of the past, says:

> "The Court has been unable to find any dishonest transaction by the trustee, Peckham."

and is not this statement justified by the charities of the law, which says:

> "But where there has been a change of circumstances with reference to the parties and the property, and still more where death has intervened, so that the mouth of one party is closed and those who represent his interests are not in a predicament to avail of the explanations which he might have made, out of the charities of the law and in consideration of the fact that fraud is never to be presumed, but must always be proved and proved clearly, the courts limit very much, in such cases, the measure of time within which they will grant relief, because the pre-

sumption comes in aid of the dead man, that he has gone to his account with a clear conscience."

To end this litigation, we pray that the judgment of the trial court be affirmed.

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ADDENDUM

The following tabulation reflects each and all of the checks complained of by the Wichita Royalty Company and listed in paragraph 17 of its amended cross complaint (R. 197-200), same being all of the Wichita Royalty Company's complaint set forth in its entire amended cross action. (R. 190-231.)

In this tabulation each check is listed in the same manner as in the cross complaint, together with the number, the date, the amount, the payee, and the purposes for which said checks were given, and are shown in the first five columns of the tabulation below and opposite each check is reflected the evidence pertaining thereto of the respective witnesses, Lambert, Harrell, Carson, and other witnesses, including the witness Wallace, auditor for the Royalty Company, followed also by witness Scannell and exhibits pertaining to each of said checks.

The evidence referred to shows that each and every check was represented by a voucher, retained in the office of the Wichita Royalty Company, and the proceeds of each check was used for the very purpose stated in the voucher retained in the office of the Royalty Company, except:

Check No.	*Date*	*Amount*	*Evidence*
571	1-19-27	$2,000.00	R. 1455, 1456
579	2-19-27	2,500.00	R. 1455, 1456
591	3-23-27	2,000.00	R. 1458
Sale price of Wilson and Vaughn Royalties		11,400.00	R. 1461,1462,914-916
Deficit of Payments on Notes to the Bank		1,929.67	R. 1460, 893-896
Total Funds Unaccounted for		19,829.67	R. 1504, 807

(Note: The proceeds of the sale of the Wilson and Vaughn Royalties were never deposited in the account of the Wichita Royalty Company, R. 1461, 1462, 914-917.)

This sum of $19,829.67 corresponds, with the exception as to one dollar difference, with the claim that E. E. Scannell filed with the administrator in December, 1930. (R. 807.)

ITEMS COMPLAINED OF (R-190-231)

Paragraph XVII. (R-197-200)

Check No.	Date	Amount	Payee	Purpose	EVIDENCE — TESTIMONY: Lambert	Harrell	Carson	Miscellaneous	Scannell
								R-1739-40	R-1156-61
427	10- 8-25	$5,500.00	Bank	To Purchase Royalties	R-1445; R-1480		R-566-70; 817-22	R-1283-5	R-722-3; 792-4; 799
451	12-28-25	1,250.00	Bank	To Purchase Royalties	R-1446; R-1480-1	R-1273	R-570-1; 823-4-32	R-1743	R-723-4; 1163-75
452	1- 4-26	5,000.00	Bank	To Purchase Royalties	R-1447-8-9	R-450-1; 1264-73	R-571; 481; 483; 832-6		R-1175-80
458	1-11-26	5,000.00	Bank	To Purchase Royalties	R-1447-8-9	R-450-1; 1293-6	R-571; 481; 483; 832-6		
461	3- 6-26	15,769.07	Bank	To Purchase Royalties	R-1447-8-9	R-450-1298	R-571; 481; 483; 832-6		
478	3- 6-26	17,623.70	Bank	To Purchase Marlborough	R-1449-50; 1552	R-1275-8	R-840-7		R-693-4; 732-45
479	3- 6-26	6,000.00	Security National Bank	To Purchase Marlborough	R-1449-50		R-841; 853		R-693-4; 786-89
481	3-31-26	7,500.00	Bank	To Purchase Marlborough	R-1450		R-854-5		R-695; 803
497	3-23-26	300.00	Bank	Interest on Note at Bank	R-1450		R-857		
503	5-20-26	3,000.00	Peckham	Marlborough Improvements	R-1450-1		R-857-60		R-695
506	5-29-26	500.00	Bank	Interest on Note at Bank	R-1451		R-862		
507	5-29-26	1,500.00	Bank	Marlborough Improvement	R-1450-1		R-857-60		R-695
510	6-16-26	4,500.00	Bank	Marlborough Improvement	R-1450-1		R-857-60		R-695
519	7-13-26	1,000.00	Bank	Marlborough Improvement	R-1450-1		R-857-60		R-695
521	7-16-26	300.00	Bank	Interest on Note at Bank	R-1452		R-862-3		
525	8- 2-26	4,000.00	Bank	To Pay Highland Note	R-1452-3		R-863-4	R-1749	R-695
531	8-27-26	500.00	Bank	Interest on Note at Bank	R-1453-4		R-870		
532	8-27-26	4,357.58	Bank	To Pay Highland Note	R-1452-3		R-863-4	R-1749	R-695-6
540	10-13-26	300.00	Bank	Interest on Note at Bank	R-1453		R-871		
550	11-20-26	7,500.00	Bank	To Purchase Royalties	R-1456-7-8		R-871-2-8		R-724-5-6
554	12- 2-26	1,500.00	Bank	To Purchase Royalties	R-1456-7-8		R-871-2-8		R-723-4-6-7
556	12-26-26	700.00	Peckham	To Pay Highland Note	R-1452-3		R-863-4	R-1749	R-696
556-A	12-22-26	538.16	Peckham	To Pay Highland Note	R-1452-3		R-863-4	R-1749	R-696
557	12- 7-26	1,920.00	Bank	To Pay Draft for Royalties	R-1454-5		R-527-533; 879	R-1743	R-727
569	1-11-27	300.00	Bank	Interest on Note at Bank	R-1455		R-880		
571	1-19-27	2,000.00	Bank	Marlborough Improvements	R-1455-6		R-880-1		R-686-696
579	2-19-27	2,900.00	Bank	Marlborough Improvements	R-1455-6		R-880-1		R-686-696
582	3- 1-27	500.00	Bank	Interest on Note at Bank	R-1456		R-882-3		
583	3- 1-27	301.82	Bank	To Purchase Royalties	R-1456-7-8		R-872-8		R-726
584	3- 1-27	500.00	Bank	Interest on Note at Bank	R-1456		R-887		
591	3-23-27	2,000.00	Bank	To Purchase Royalties	R-1458		R-888		R-686
599	4-14-27	300.00	Bank	Interest on Note at Bank	R-1458		R-889		
615	6- 8-27	500.00	Bank	Interest on Note at Bank	R-1458-9		R-889		
620	6-18-27	1,200.00	Bank	To Pay Note at Bank	R-1459-60-1		R-889-93; 896		R-686
628	7-16-27	1,500.00	Bank	Note at Bank	R-1459		R-899-900		
635	8-16-27	1,500.00	Bank	Note at Bank	R-1459-60-1		R-889-93; 896		R-686
650	10-14-27	2,400.00	Bank	Note at Bank	R-1459-60-1		R-890-3; 896		R-686
657	11-25-27	1,800.00	Bank	Note at Bank	R-1459-60-1		R-890-3; 896		R-686
682	1-18-28	2,000.00	Bank	Note at Bank	R-1461		R-900		
710	4-20-28	1,850.00	Bank	Note at Bank	R-1459-60-1		R-890-3; 896		R-686
717	5-17-28	220.00	Bank	Interest on Note at Bank	R-1461		R-901		
721	6- 1-28	424.66	Bank	Interest on Note at Bank	R-1461		R-901-2		
733	7-23-28	220.00	Bank	Interest on Note at Bank	R-1461		R-902-3		
752	9-27-28	424.66	Bank	Interest on Note at Bank	R-1459-60-1		R-890-3; 896		
768	12- 4-28	2,000.00	Bank	To Pay Note at Bank	R-1461		R-903		
791	2-19 29	1,500.00	Bank	To Pay Note at Bank	R-1461		R-903-4		
814	6- 7-29	1,500.00	Bank	To Pay Note at Bank	R-1461		R-904		
824	7-15-29	212.49	Bank	To Pay Interest on Bank Note	R-1461		R-905		
836	8-30-29	1,000.00	Bank	To Pay Note at Bank	R-1461		R-905-6		
856	11-23-29	1,500.00	Bank	To Pay Note at Bank	R-1461		R-905-7		
880	1-24-30	1,500.00	Marlborough	To Repay Loan	R-1462-3		R-907-8		R-696-7
890	2-24-30	1,000.00	Bank	To Pay Note at Bank	R-1462-3		R-908		
898	4-10-30	1,000.00	Bank	To Pay Note at Bank	R-1462-3		R-910-11		
908	5-13-30	500.00	Texas Inv. Co.	To Pay Marlborough Note	R-1462-3		R-911-12		R-697
920	6-14-30	1,500.00	Bank	To Pay Note at Bank	R-1462-3		R-912-13		
930	7-14-30	3,055.42	Bank	To Pay Note at Bank	R-1462-3		R-913-14		

Paragraph XVIII. (R-201)

Sale of Two Royalties for $12,048.00, which was misappropriated by Peckham with the knowledge of the Bank — R-1461-2; R-914-5-6-7; R-920-4; R-1750-1

Paragraph XIX. (R-201)

That Peckham used trust funds, with the knowledge of the Bank, with which to pay $57,764.21 of personal obligations to the Bank — R-1378-9; R-1399; 1404-6; R-1424-6; 1440-1; R-1476; 1442-3; 1504; R-925-6; R-1746-8-9-50

Paragraph LIV. (R-219-20-21-22)

That the acquisition of the Grimshaw Royalty was a wrongful purchase — R-1466-7; 1545-6; R-928-31; 933; R-1741; 1746; R-699-704

S COMPLAINED OF (R-190-231)

aragraph XVII. (R.-197-200)

ount	Payee	Purpose	Lambert	Harrell	Carson	Miscellaneous	Scannell	Exhibits
						EVIDENCE — TESTIMONY		
0.00	Bank	To Purchase Royalties	1445; R-1480		R-566-70; 817-22	R-1739-40	R-1156-61	
0.00	Bank	To Purchase Royalties	1446; R-1480-1	R-1273	R-570-1;823-4-32	R-1283-5	R-722-3; 792-4; 799	R-818-20-22
.00	Bank	To Purchase Royalties	1447-8-9	R-450-1; 1264-73	R-571; 481; 483; 832-6	R-1743	R-723-4; 1163-75	R-824-5
.00	Bank	To Purchase Royalties	1447-8-9	R-450-1; 1293-6	R-571; 481; 483; 832-6		R-1175-80	R-451; 1797; 835-7
.07	Bank	To Purchase Royalties	1447-8-9	R-450-1298	R-571; 481; 483; 832-6			R-451; 1797; 835-7
.70	Bank	To Purchase Marlborough	1449-50; 1552	R-1275-8	R-840-7		R-693-4; 732-45	R-451; 1797; 835-7
.00	Security National Bank	To Purchase Marlborough	1449-50		R-841; 853		R-693-4; 786-89	R-733; 738-43
.00	Bank	To Purchase Marlborough	1450		R-854-5		R-695; 803	R-785; 842; 845
.00	Bank	Interest on Note at Bank	1450		R-857			
.00	Peckham	Marlborough Improvements	1450-1		R-857-60		R-695	
.00	Bank	Interest on Note at Bank	1451		R-862			
00	Bank	Marlborough Improvement	1450-1		R-857-60		R-695	
00	Bank	Marlborough Improvement	1450-1		R-857-60		R-695	
00	Bank	Interest on Note at Bank	1452		R-862-3			
00	Bank	To Pay Highland Note	1452-3		R-863-4	R-1749	R-695	R-865; 869
00	Bank	Interest on Note at Bank	1453-4		R-870			
58	Bank	To Pay Highland Note	1452-3		R-863-4	R-1749	R-695-6	R-865; 869
00	Bank	Interest on Note at Bank	1453		R-871			
00	Bank	To Purchase Royalties	1456-7-8		R-871-2-8		R-724-5-6	
00	Bank	To Purchase Royalties	1456-7-8		R-871-2-8		R-723-4-6-7	
00	Peckham	To Pay Highland Note	1452-3		R-863-4	R-1749	R-696	R-865; 869
16	Peckham	To Pay Highland Note	1452-3		R-863-4	R-1749	R-696	R-865; 869
00	Bank	To Pay Draft for Royalties	1454-5		R-527-533; 879	R-1743	R-727	
00	Bank	Interest on Note at Bank	1455		R-880			
00	Bank	Marlborough Improvements	1455-6		R-880-1		R-686-696	R-807; 881
00	Bank	Marlborough Improvements	1455-6		R-880-1		R-686-696	R-807; 881
00	Bank	Interest on Note at Bank	1456		R-882-3			
12	Bank	To Purchase Royalties	1456-7-8		R-872-8		R-726	
00	Bank	Interest on Note at Bank	1456		R-887			
00	Bank	To Purchase Royalties	1458		R-888		R-686	R-807
00	Bank	Interest on Note at Bank	1458		R-889			
00	Bank	Interest on Note at Bank	1458-9		R-889			
00	Bank	To Pay Note at Bank	1459-60-1		R-889-93; 896		R-686	R-807
00	Bank	Note at Bank	1459		R-899-900			
00	Bank	Note at Bank	1459-60-1		R-889-93; 896		R-686	R-807
00	Bank	Note at Bank	1459-60-1		R-890-3; 896		R-686	R-807
00	Bank	Note at Bank	1459-60-1		R-890-3; 896		R-686	R-807
00	Bank	Note at Bank	1461		R-900			
00	Bank	Note at Bank	1459-60-1		R-890-3; 896		R-686	R-807
00	Bank	Interest on Note at Bank	1461		R-901			
00	Bank	Interest on Note at Bank	1461		R-901-2			
00	Bank	Interest on Note at Bank	1461		R-902-3			
00	Bank	Interest on Note at Bank	1459-60-1		R-890-3; 896			
00	Bank	To Pay Note at Bank	1461		R-903			
00	Bank	To Pay Note at Bank	1461		R-903-4			
00	Bank	To Pay Note at Bank	1461		R-904			
00	Bank	To Pay Interest on Bank Note	1461		R-905			
00	Bank	To Pay Note at Bank	1461		R-905-6			
00	Bank	To Pay Note at Bank	1461		R-906-7			
00	Marlborough	To Repay Loan	1462-3		R-907-8		R-696-7	
00	Bank	To Pay Note at Bank	1462-3		R-908			
00	Bank	To Pay Note at Bank	1462-3		R-910-11			
00	Texas Inv. Co.	To Pay Marlborough Note	1462-3		R-911-12		R-697	
00	Bank	To Pay Note at Bank	1462-3		R-912-13			
00	Bank	To Pay Note at Bank	1462-3		R-913-14			

Paragraph XVIII. (R-201)

$12,048.00, which was misappropriated by Peckham with the
k — R-1461-2 — R-914-5-6-7; R-920-4 — R-1750-1 — R-807; 916

Paragraph XIX. (R-201)

R-1378-9; R-1399; 1404-6

funds, with the knowledge of the Bank, with which to pay
l obligations to the Bank — R-1424-6; 1440-1; R-1476; 1442-3; 1504 — R-925-6 — R-1746-8-9-50

aragraph LIV. (R-219-20-21-22)

Grimshaw Royalty was a wrongful purchase — R-1466-7; 1545-6 — R-928-31; 933 — R-1741; 1746 — R-699-704 — R-700-1

Paragraph LV. (R-222-23)

569	1-11-27	300.00	Bank	Interest on Note at Bank	1455
571	1-19-27	2,000.00	Bank	Marlborough Improvements	1455-6
579	2-19-27	2,500.00	Bank	Marlborough Improvements	1455-6
582	3- 1-27	900.00	Bank	Interest on Note at Bank	1456
583	3- 1-27	301.82	Bank	To Purchase Royalties	1456-7-8
584	3- 1-27	900.00	Bank	Interest on Note at Bank	1456
591	3-23-27	2,000.00	Bank	To Purchase Royalties	1458
599	4-14-27	300.00	Bank	Interest on Note at Bank	1458
615	6- 8-27	900.00	Bank	Interest on Note at Bank	1458-9
620	6-18-27	1,200.00	Bank	To Pay Note at Bank	1459-60-1
628	7-16-27	1,500.00	Bank	Note at Bank	1459
635	8-16-27	1,500.00	Bank	Note at Bank	1459-60-1
650	10-14-27	2,400.00	Bank	Note at Bank	1459-60-1
657	11-23-27	1,800.00	Bank	Note at Bank	1459-60-1
682	1-18-28	2,000.00	Bank	Note at Bank	1461
710	4-20-28	1,850.00	Bank	Note at Bank	1459-60-1
717	5-17-28	220.00	Bank	Interest on Note at Bank	1461
721	6- 1-28	424.66	Bank	Interest on Note at Bank	1461
733	7-23-28	220.00	Bank	Interest on Note at Bank	1461
752	9-27-28	424.66	Bank	Interest on Note at Bank	1459-60-1
768	12- 4-28	2,000.00	Bank	To Pay Note at Bank	1461
791	2-19-29	1,500.00	Bank	To Pay Note at Bank	1461
814	6- 7-29	1,500.00	Bank	To Pay Note at Bank	1461
824	7-15-29	212.49	Bank	To Pay Interest on Bank Note	1461
836	8-30-29	1,000.00	Bank	To Pay Note at Bank	1461
856	11-23-29	1,500.00	Bank	To Pay Note at Bank	1461
880	1-24-30	1,500.00	Marlborough	To Repay Loan	1462-3
890	2-24-30	1,000.00	Bank	To Pay Note at Bank	1462-3
898	4-10-30	1,000.00	Bank	To Pay Note at Bank	1462-3
908	5-13-30	500.00	Texas Inv. Co.	To Pay Marlborough Note	1462-3
920	6-14-30	1,500.00	Bank	To Pay Note at Bank	1462-3
930	7-14-30	3,055.42	Bank	To Pay Note at Bank	1462-3

Paragraph XVIII. (R-201)

Sale of Two Royalties for $12,048.00, which was misappropriated by Peckham with the knowledge of the Bank — R-1461-2

Paragraph XIX. (R-201)

That Peckham used trust funds, with the knowledge of the Bank, with which to pay $57,764.21 of personal obligations to the Bank — R-1378-9; R-1399; 1404-6; R-1424-6; 1440-1; R-1476; 1442-3; 1504

Paragraph LIV. (R-219-20-21-22)

That the acquisition of the Grimshaw Royalty was a wrongful purchase — R-1466-7; 1545-6

Paragraph LV. (R-222-23)

That the purchase of a company automobile was a wrongful transaction — R-1470

Paragraph LVI. (R-223-24)

That the purchase and sale of the Wilson Royalty was a wrongful series of transactions — R-1468-72; 1545-7

Paragraph LVII. (R-224)

That the purchase of the H. H. White lands was a wrongful transaction — R-1471; 1547-8

Paragraph LIX. (R-225)

That the acquisition of the Routon Royalty was a wrongful transaction — R-1472-3

Paragraph LXII. (R-226)

That the purchase of the Anderson and Vernon Royalties was a wrongful transaction — R-1473-5

Paragraph LXIX. (R-228)

That the purchase of the Milner Oil Payment was a wrongful transaction — R-1454; 1550

Paragraph LXXIV. (R-229)

That the acquisition of the Curtis Lane Royalty was a wrongful transaction — R-1472; 1548

Paragraph LXXV. (R-229-30)

That, over the period of his trusteeship, Peckham, with the knowledge of the Bank, diverted trust funds to the payment of his personal indebtedness to the Bank — R-1399; 1404-6; R-1424-6; 1440-1; R-1465; 1504

	R-527-533; 879	R-1743	R-727
	R-880		
	R-880-1		R-686-696
	R-880-1		R-686-696
	R-882-3		
	R-872-8		R-726
	R-887		
	R-888		R-686
	R-889		
	R-889		
	R-889-93; 896		R-686
	R-899-500		
	R-889-93; 896		R-686
	R-890-3; 896		R-686
	R-890-3; 896		R-686
	R-900		
	R-890-3; 896		R-686
	R-901		
	R-901-2		
	R-902-3		
	R-890-3; 896		
	R-903		
	R-903-4		
	R-904		
	R-905		
	R-905-6		
	R-906-7		
	R-907-8		R-696-7
	R-908		
	R-910-11		
	R-911-12		R-697
	R-912-13		
	R-913-14		
	R-914-5-6-7	R-1750-1	
	R-920-4		
	R-925-6	R-1746-8-9-50	
	R-928-31; 933	R-1741; 1746	R-699-704
	R-933		R-730; 808
	R-933-36	R-1741-2	R-707-8-9 R-710; 1148
	R-936-43	R-1742-3	R-712-3; 1148-52
	R-943-46	R-1751-3 R-1743	R-713-14; 1154
	R-947-57	R-1643-5	R-715-6-7; 1155-6 R-1646-8
	R-957-60		R-719-20
	R-960-2	R-1668	R-721-2; 1153
		R-1649;1736 R-1737-40	

	To Purchase Royalties	R-1458		R-887		
	Interest on Note at Bank	R-1456		R-888		R-686 R-807
	To Purchase Royalties	R-1458		R-889		
	Interest on Note at Bank	R-1458		R-889		
	Interest on Note at Bank	R-1458-9		R-889-93; 896		R-686 R-807
	To Pay Note at Bank	R-1459-60-1		R-899-900		
	Note at Bank	R-1459		R-889-93; 896		R-686 R-807
	Note at Bank	R-1459-60-1		R-890-3; 896		R-686 R-807
	Note at Bank	R-1459-60-1		R-890-3; 896		R-686 R-807
	Note at Bank	R-1459-60-1		R-900		
	Note at Bank	R-1461		R-890-3; 896		R-686 R-807
	Note at Bank	R-1459-60-1		R-901		
	Interest on Note at Bank	R-1461		R-901-2		
	Interest on Note at Bank	R-1461		R-902-3		
	Interest on Note at Bank	R-1461		R-890-3; 896		
	Interest on Note at Bank	R-1459-60-1		R-903		
	To Pay Note at Bank	R-1461		R-903-4		
	To Pay Note at Bank	R-1461		R-904		
	To Pay Note at Bank	R-1461		R-905		
	To Pay Interest on Bank Note	R-1461		R-905-6		
	To Pay Note at Bank	R-1461		R-906-7		
	To Pay Note at Bank	R-1461		R-907-8		R-696-7
rough	To Repay Loan	R-1462-3		R-908		
	To Pay Note at Bank	R-1462-3		R-910-11		
	To Pay Note at Bank	R-1462-3		R-911-12		R-697
nv. Co	To Pay Marlborough Note	R-1462-3		R-912-13		
	To Pay Note at Bank	R-1462-3		R-913-14		
	To Pay Note at Bank	R-1462-3				

raph XVIII. (R-201)

, which was misappropriated by Peckham with the ..... R-1461-2 ..... R-914-5-6-7 ..... R-1750-1 ..... R-807; 916
R-920-4

raph XIX. (R-201)

the knowledge of the Bank, with which to pay R-1399; 1404-6; R-1424-6; 1440-1
ns to the Bank ..... R-1378-9; R-1476; 1442-3; 1504 ..... R-925-6 ..... R-1746-8-9-50

h LIV. (R-219-20-21-22)

Royalty was a wrongful purchase ..... R-1466-7; 1545-6 ..... R-928-31; 933 ..... R-1741; 1746 ..... R-699-704 ..... R-700-1

raph LV. (R-222-23)

mobile was a wrongful transaction ..... R-1470 ..... R-933 ..... R-730; 808

aph LVI. (R-223-24)

son Royalty was a wrongful series of transactions ..... R-1468-72; 1545-7 ..... R-933-36 ..... R-1741-2 ..... R-707-8-9; R-710; 1148 ..... R-706; 1147

raph LVII. (R-224)

lands was a wrongful transaction ..... R-1471; 1547-8 ..... R-936-43 ..... R-1742-3 ..... R-712-3; 1148-52

raph LIX. (R-225)

alty was a wrongful transaction ..... R-1472-3 ..... R-943-46 ..... R-1751-3; R-1743 ..... R-713-14; 1154

aph LXII. (R-226)

Vernon Royalties was a wrongful transaction ..... R-1473-5 ..... R-947-57 ..... R-1643-5 ..... R-715-6-7; 1155-6; R-1646-8

ph LXIX. (R-228)

ent was a wrongful transaction ..... R-1454; 1550 ..... R-957-60 ..... R-719-20 ..... R-721

h LXXIV. (R-229)

oyalty was a wrongful transaction ..... R-1472; 1548 ..... R-960-2 ..... R-1668 ..... R-721-2; 1153

LXXV. (R-229-30)

Peckham, with the knowledge of the Bank, ... R-1399; 1404-6; R-1424-6; 1440-1
his personal indebtedness to the Bank ..... R-1465; 1504 ..... R-1649; 1736; R-1737-40

We point out some of the many errors found in petioner's brief.

The old bank never became insolvent, in that its assets were insufficient to pay its debts. The only question was as to whether it could pay the depositors on demand. (R. 431.)

The item of $2,550 mentioned by the trial court (R. 1928) was a check dated January 8, 1926, signed by G. W. Peckham for the purchase price of his interest in the Curlee land. It was paid on January 11, 1926, and the proceeds of the check were deposited to the credit of W. S. Curlee. (R. 571.) The check is Defendant's Exhibit 155, R. 1298. The Bank received none of the proceeds of this check. The check did not create an overdraft. (R. 582.) Peckham's balance after the payment of this check was $4,888.30. The deed from Curlee to Peckham and Harrell was dated 1-8-26. (R. 483.)

It is stated by petitioner that Harrell personally received with Basham $24,611.02. While this statement is correct, this sum was received open and aboveboard for the sale price of the Stephens Royalty, which was retained and held by the present trustee and sold by him. The venture was clearly within the terms of the Trust. Harrell's testimony (R. 1264-1273), Carson's testimony (R. 833-839), Lambert's testimony (R. 1447-1449, 1481), and Scannell's testimony (R. 1175-1180) show nothing was wrong with this transaction.

While it is true that Peckham transferred large sums of money during his tenure of office as trustee from the Royalty account to his personal account, to wit, $186,-859.20, instead of the amount stated by the petitioner,

nevertheless he purchased many valuable royalties for the Company with his personal funds and was reimbursed therefor, about which there is no question. The total aggregate amount of income therefrom would greatly exceed the total amount of the transfers. It must be noted that this trust under Peckham's administration was profitable to the stockholders and paid, as the trial court points out, 118 per cent in dividends. It is also to be noted that during this same period of time the total aggregate amount of Peckham's deposits in his personal account was the sum of $1,688,534.13. (R. 1354, Plaintiff's Exhibit 207.)

It is true that many of the checks in question were payable to the payee bank, but this was a plan instituted by Scannell prior to the time Peckham became trustee of making disbursements on checks payable to the payee bank. It had no significance. (R. 1465.)

The statement on page 7 of the petitioner's brief that Peckham executed a deed and handed it to the trust's bookkeeper, with a letter stating that *Harrell* was unwilling to be associated in the stock company, is at variance with the letter shown on page 786 of the Record, and, while the Supreme Court of Texas held that Marlborough was not a proper account, this was held, under the false testimony of Scannell, that the deed had not been delivered.

On page 8 petitioner states that $15,250 was to apply, but did not apply, upon the Trust note payable to the Bank. This statement is not correct. Checks issued in the amount of $9,174.66, with voucher notations "to apply on notes payable to the bank," were deposited in

Peckham's personal account, of which amount Peckham actually applied $7,244.99, leaving a balance of $1,-929.67 unaccounted for. (R. 1491; also R. 1503, 1504.)

Respecting the item of $15,140.78, all of these royalties were shown by the books of the Company to have been acquired by the Company. The Hartley County Royalty of $1,920 was a contemporaneous transfer from the true owner to Peckham and from Peckham to the Company. He was merely a conduit. Many others, as found by the trial court, were of the same nature. (R. 1926.)

The Callahan County Royalty transfer was made direct by A. J. Mathis to the Wichita Royalty Company. (R. 817.) The deed is shown R. 568, 569.

The Porter Ranch was taken in the name of Knight & Hines, who held the ranch in trust for the Royalty Company and the other joint owners. (R. 1169-1171.) The Record shows that the Royalty Company owned an undivided one-eighth interest in this ranch and the stockholders were notified of its acquisition. (R. 1171.) It paid, along with the other joint owners, its exact pro rata of the cost.

While it is stated by petitioner that the stockholders were never advised as to the source of the various titles, nevertheless all of the deeds, including the deed to Marlborough, were kept by Scannell, open for inspection to any stockholder. (R. 731, 737.)